

ANDREW M. KRAMER
Executive Director
Office of Collective Bargaining
Springfield, Illinois

The Legal Environment

The legal environment surrounding the unionization of library personnel must be discussed from several different standpoints. At the outset, one must differentiate among library personnel on the basis of whom they work for. Library personnel working for private universities come under the National Labor Relations Act (NLRA). Library personnel working for public employers in some states come under the jurisdiction of a state public employee labor relations act, while such personnel in other states have no statutory protection and must rely on judge-made law which varies from state to state.

For many years library personnel were in the no-man's land of labor relations, outside the reach of any statutory framework to guide them in their dealings with their employer. The National Labor Relations Board (NLRB) had refused to assert jurisdiction over private, nonprofit colleges and universities until 1970, when in its *Cornell University* (183 NLRB 41) decision it decided to assert jurisdiction over such institutions.

Library personnel working for public employers are not under the jurisdiction of the NLRA. As public employees, they have been slow to achieve many of the rights which have long been enjoyed by employees in the private sector. Since a large number of library personnel work in the public sector, it is important to provide some background with respect to public sector bargaining.

When we consider public employee bargaining from a historical perspective, we are not talking of bargaining but rather of the restraints imposed in preventing union organization and bargaining from ever taking place. Nearly two decades ago, the report of the American Bar Association Committee on Labor Relations of Governmental Employees suggested that: "a government which imposes upon other employers certain obligations in dealing with their employees may not in good faith refuse to deal with its own public servants on a reasonably similar basis, modified, of course, to meet the exigencies of the public service."¹

At the time of that report it was generally accepted that public employees did not have any right to bargain. Indeed, in 1945 the Supreme Court had occasion to note that "under customary practices government employees do not bargain collectively with their employer."²

A central rationale leading to the denial of bargaining rights in the public sector was the concept of sovereignty. Since collective bargaining is premised on a bilateral determination of conditions of employment, it was viewed as an interference in the sovereign's affairs. Typical of the attitude which prevailed is the opinion of the Florida Attorney General in 1944 in which he stated: "no organization, regardless of who it is affiliated with, union or non-union, can tell a political subdivision possessing the attributes of sovereignty, who it can employ, how much it shall pay them, or any other matter relating to its employees. To countenance such a proposition would be to surrender a portion of sovereignty that is possessed by every municipal corporation."³

During the same time that bargaining rights were being denied, certain groups of public employees were thwarted even in their efforts to organize. Various courts sustained discharges of public employees for becoming members of labor unions on the grounds that such membership either violated a state statute or the court's perception of state public policy.

It is of some interest to note that public employees were on several occasions granted the right to organize on the basis of a state right-to-work law. In a reversal of the popular concept of their role, some courts construed state right-to-work laws as allowing public employees the right to organize and join labor unions.⁴

Until recently, and even now with rare exception, public employees have been denied the right to strike. In enjoining strikes, courts noted the need for government services to be unobstructed and held that such strikes contravene public welfare.⁵

Historically, courts have generally been either disinclined or compelled to analyze at length the basis for enjoining public employee strikes. A finding that such strikes result in a denial of government authority seems to reflect the conclusion that strikes compel governmental decisions that would otherwise not be made.

Many of the decisions prohibiting public employee strikes have arisen in states which have "Little Norris-LaGuardia Acts" prohibiting the issuance of injunctions in labor disputes. Even in the absence of express exclusion, however, these anti-injunction statutes have not been held applicable to public employees.⁶

While the role of the law in the past has been a negative factor with respect to public employee bargaining, significant changes have occurred over the past fifteen years. Federal courts have recognized the constitutional rights

of public employees to join and form labor unions and have struck down statutes prohibiting public employees from joining unions.⁷ Federal and state courts have also become increasingly sensitive to the due process rights of public employees.

In more than thirty-six states and in the federal government the debate over the legitimacy of public employee organizational and bargaining rights is academic as a result of legislation or executive order. The public sector bargaining legislation which has been enacted raises numerous issues which have no analogy to the private sector. While space does not permit discussion of all of these issues, some of the present approaches to public employee bargaining deserve mention.

It is often suggested that one of the distinguishing features between the private and public sectors is that in the private sector management and unions negotiate under the constraints of the market place. Management in the private sector considers the effects of increased labor costs on the price of items being manufactured as well as competitive forces and consumer preference. In the public sector, however, services are not generally dependent on the revenues they produce and most often are exclusive in nature. This does not mean, however, that the constraints found are no less effective than those in the private sector.

It is the political process which imposes some of the major constraints in the public sector. The type of service provided, the location where such services are to be provided, and the allocation of revenue to provide such services is often dependent upon political opinion and political pressures. Thus, it has been argued, opening the door to full-scale bargaining, as has evolved in the private sector, will "institutionalize the power of public employee unions in a way that would leave competing groups in the political process at a permanent and substantial disadvantage."⁸

In applying these views, some states and the federal government have chosen to limit the scope of bargaining by executive order. Thus, in some states public employers are not required to bargain over matters of "inherent managerial policy," including "the functions and programs of the public employer, standards of services [and] standards of work." Other states such as Michigan have not chosen to limit the duty to bargain, however, and have imposed a duty similar to that imposed under the NLRA.

In addition to the impact of the political process on defining the scope of bargaining, another factor which has played a significant role is the presence of civil service systems. In many states and municipalities, civil service systems have come to encompass all aspects of employee relations and not just those aspects related to the merit principle. In Illinois, for example, the personnel code and its implementing rules cover most of the matters found in private sector collective bargaining agreements.

Unfortunately, many states have ignored the pervasive impact of civil service statutes and rules in drafting public sector bargaining legislation. The failure to deal adequately with this issue leads ultimately to judicial accommodation—a solution ill suited to treat fully the complexities presented.⁹

Another issue which has not been fully considered in drafting public sector legislation is the definition of who the public employer really is. Is it the executive branch, or does that title belong to the legislature or a county board which ultimately approves the monetary terms of any agreement through the appropriation process?

Very little attention has been given to this issue which bears directly on the implementation of a statutory duty to bargain in good faith. One state which has at least addressed itself to this problem is Wisconsin. Under the Wisconsin Public Employee Relations Act, the term *employer* is defined to reflect the differences between the legislative and executive branches. While the state is considered as a single employer, the act sets out the role of the legislature with respect to the implementation and approval of collective bargaining agreements.

One of the critical issues faced in the public sector is the determination of appropriate bargaining units. While Martin Schneid discusses this issue in depth elsewhere in this volume, it is necessary for me to touch upon some of the problems posed.

Bargaining unit determinations in the public sector have far-reaching consequences since the establishment of a given unit affects the structure of bargaining and has a measurable impact on the traditional governmental policy of maintaining, where possible, uniformity of terms and conditions of employment.

Unit determinations in states which do not have legislation are made either by the parties or by the employer. For example, in *Chicago High School Assistant Principals Association v. Board of Education of the City of Chicago* the court was faced with the issue of whether the Board of Education had to recognize high school assistant principals as a separate unit for purposes of collective bargaining. Assistant principals were covered under the Board of Education's collective bargaining agreement with the Chicago Teachers Union. The agreement contained no provision for the severance of assistant principals and the board refused to recognize this group as a separate unit. In supporting the board's action, the court noted that it was "clear [that] the Board wanted to deal with just one bargaining unit" and that if each of the groups covered under the contract "were allowed to carve out its own bargaining unit, the extended negotiation would work an undue hardship on the Board in carrying out its necessary public purpose."¹⁰

The absence of criteria to govern unit determinations generally brought about a proliferation of units since public employers and state legislatures gave

little consideration to this issue. For example, in New York City more than 380 separate units were established—some containing as few as two employees. Similar patterns were found under Executive Order 10988, in Wisconsin, Massachusetts and Oregon.

Among the factors most frequently mentioned in determining bargaining units are: (1) clear and identifiable community of interest among employees; (2) establishment of units which will promote effective collective bargaining; and (3) establishment of units in light of the operational efficiency of the agency or agencies involved. In addition to these general considerations, numerous states have now imposed explicit criteria to deal with the problem of fragmented bargaining units.

When dealing with state employees, legislatures have been even more explicit in terms of unit determinations. The Pennsylvania act requires the board to consider "that when the Commonwealth is the employer, it will be bargaining on a statewide basis unless issues involve work conditions peculiar to a given governmental locale."¹¹ The Illinois Executive Order covering state employees requires the office of collective bargaining to "promote the interest of the State in bargaining on a statewide basis by considering statewide units presumptively appropriate."¹² Similarly, the Minnesota act draws a distinction between municipal employees and state employees by requiring the director of mediation services to "define appropriate units of state employees as all the employees under the same appointing authority except where professional, geographical or other considerations affecting employment relations clearly require appropriate units of some other composition."¹³

The trend toward statewide units is not uniform. Several states have found separate units appropriate in cases involving educational institutions. For example, in *Ft. Hays Kansas State College*, the Kansas Public Employee Relations Board stated that it "would allow public employees at each unit of higher education to organize an individual institutional unit."¹⁴ In discussing the rational of its decision the board noted:

Each institution, we feel, is a separate distinct operating entity with a complex relationship already existing between the public employees and the administration therein. The principles of efficient administration will be maintained inasmuch as the evidence before this board indicates that most problems concerning conditions of employment with university employees have been handled on a local basis; i.e., between the local university administration and the employee. . . . Some previous history of employee organization, specifically KU Medical Center, was noted but not considered as having great weight. However, geographical location posed a possible serious problem, especially when considered with the concept of the separate identity of each institution as mentioned above. The difficulties of employees organizing over a great distance (i.e., the distance between Wichita and Fort Hays) when considered in light of

the fact that each institution has operated as a separate identity made the unit determinations on an individual basis seem most logical. The board did not view the problems of overfragmentation and splintering of a work force as automatically requiring a statewide unit in every case, but that each case must be reviewed on its own merit, thus our decision of the individual institutional units.¹⁵

The above approach can be contrasted with the approach taken in New York and New Jersey. The New York board held that a university-wide faculty bargaining unit was appropriate since "the concomitant differences among the campuses do not establish such conflicts of interest between their respective professions as to warrant geographic fragmentation."¹⁶ A similar result was reached by the New Jersey commission when it reversed its earlier determination that separate units were appropriate.¹⁷

Recently the director of public employment practices and representation of the New York Public Employment Relations Board was faced with a decertification petition on behalf of nonacademic professionals who were in a statewide unit combined with academic professionals.¹⁸ The nonacademic professionals sought separate representation and a reversal of the board's earlier decision including academic and nonacademic professionals in a statewide unit. The director of public employment practices and representation held that there was no evidence to justify fragmenting the existing bargaining unit and found that the history of collective bargaining which existed after the establishment of the initial unit demonstrated that nonacademic professionals "did enjoy effective and meaningful negotiations on salaries as well as other matters."¹⁹

Even where a single campus is held to constitute an appropriate unit, questions arise with respect to the composition of that unit. In 1972 the Pennsylvania Public Employee Relations Board held that the faculty members in the university's law, dental and medical schools should be excluded from an overall unit and directed an election in the law school unit.²⁰ The Michigan Employment Relations Commission, however, rejected the establishment of separate units within a given institution and rejected the establishment of a separate medical school unit on the grounds that "it would unduly fragmentize a *teaching faculty unit* if individual schools or colleges are permitted to have separate representation."²¹

It is evident from the decisions rendered by state public employee relations boards that the trend is toward large units, particularly when dealing with state employees. It is obvious that the early problems faced in New York and Wisconsin have greatly influenced subsequent action with respect to unit determinations. The trend toward large units does not preclude the establishment of separate institutional units as evidenced by the Minnesota and Kansas decisions affecting state colleges and universities.

The trend toward large units is also evident from the National Labor Relations Board decisions concerning university employees. For example, at New York University in 1973 the board noted that while librarians were distinguished from faculty members with respect to tenure requirements, retirement age and lack of proportional representation on the university senate, they should be included in a university-wide unit with faculty members.²² While in several cases the board has rejected units composed solely of library personnel, it did find a separate unit appropriate at Claremont University in 1972.²³

In contrasting some of the rights granted employees under the National Labor Relations Act and the rights of public sector employees, we can first look at the whole concept of collective bargaining. In the private sector, a fundamental premise of national labor relations policy is the concept of free collective bargaining. Collective bargaining has long been viewed as a process by which parties settle disputes without the intervention of a third party. The strike or threat of a strike plays a fundamental role in the private sector since it is the threat of something worse which is viewed as a means to secure agreement between an employer and a union. Thus, federal courts have prohibited state interference with the collective bargaining process.

In the public sector the concept of free collective bargaining has really never surfaced since, with rare exception, public employees are denied the right to strike. Impasse resolution devices in the public sector are viewed as the means to bringing about the settlement of a dispute between two unyielding parties.

The reasons given for denying public employees the right to strike are varied. According to some, the acceptance of the right of public employees to strike would take away the authority of public officials to administer government for people. President Roosevelt had occasion to observe that "a strike of public employees manifests nothing less than an intent on their part to obstruct the operations of government until their demands are satisfied."²⁴ The Taylor Committee in New York stated that the right to strike in the public sector is not compatible with orderly functioning of a democratic form of representative government.

The future, in my opinion, will bring about a re-evaluation of the traditional notion that all public employees should be barred from striking. It is obvious that certain governmental services are essential and must be provided. This does not mean, however, that free collective bargaining with the concomitant presence of economic force cannot exist in certain areas. Indeed, one should consider whether the public is paying a higher cost by denying all public employees the right to strike and substituting for that right impasse resolution devices which might reflect higher settlements than would have been achieved had the test been one of economic warfare rather than third-party decision-making.

Moreover, declaring public employee strikes illegal has not meant the end of strikes. States which have enacted punitive antistrike legislation have often had to forego enforcement of the law since the penalties were too extreme. This was particularly true in New York under the Condon-Wadlin Act.

The failure to enforce stringent laws regarding public employee strikes is further evidence of the deep political involvement in public sector collective bargaining. A governor or mayor is both an employer and politician. These roles are not consistent since a chief executive's actions as an employer carry political overtones. Thus, in New York it was shown that the Condon-Wadlin Act was not enforced in cases where the striking union was politically strong.²⁵

In considering whether public employees should be granted the right to strike, one should also focus on the question of what issues are appropriate for strike action. There has been little consideration of this question since most states prohibit public employee strikes and even in the states providing a limited right to strike no distinction is made over the issues on which strike action can be taken.

An example of this problem is a decision of an agency to go from a program of providing institutional care to the utilization of private facilities. Some of the groups affected by such a decision are the employees at the state institution, the patients being treated, the municipality where the institution is located and special interest groups involved in the health care field. While a union representing the employees should be able to bargain with the public employer over the impact of such a decision, one can persuasively argue that decisions such as this should not be subjects over which unions can strike.

To remove an issue which might affect a broad range of social and community interests from the arena of economic warfare is not to say that public employees and their bargaining representatives should not have input with respect to that issue. Bargaining and political pressure, a tool used by public employee unions and other interest groups, offer ways in which the public employee can participate in the decision-making process.

Another troublesome issue in the public sector concerns union security agreements. As an exclusive representative, a union must represent, without discrimination, all employees in the unit regardless of union affiliation. In the private sector union security agreements are legal, except in states where right-to-work laws are in effect. Section 7 of the NLRA grants employees the right to organize and bargain collectively and the right to refrain from such activities "except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3)."²⁶

In *NLRB v. General Motors*, the Supreme Court discussed the

differences between an agency shop and a union shop in the following terms: "Under the second proviso to §8(a)(3), the burdens of membership upon which employment may be conditioned are expressly limited to the payment of initiation fees and monthly dues. It is permissible to condition employment upon membership, but membership insofar as it has significance to employment rights, may in turn be conditioned only on payment of fees and dues. 'Membership' as a condition of employment is whittled down to its financial core."²⁷ Thus, the distinction between union shop and agency shop is the choice of membership. Under an agency shop the employee is given the "option of membership" while under a union shop, that option is removed. Recently the NLRB held that the term "membership" in Section 8(a)(3) means "a financial obligation limited to payment of fees and dues."²⁸

The primary challenge to negotiating agency shop or union shop clauses in the public sector centered around the provisions in various state laws giving employees the right to refrain from union activity. In the private sector, this question has arisen within the context of right-to-work laws.

In 1963 the Florida Supreme Court held that a clause requiring the payment of service fees as a condition of employment was violative of the right-to-work section of the Florida Constitution.²⁹ The court based its decision on the fact that an individual's "right to work" without regard to union membership was "abridged" when the individual was required to pay a fee to continue working.

A contrary view of a right-to-work provision is found in *Meade Electric Co. v. Hagberg*. There, the court held that the Indiana right-to-work law did not bar negotiation of agency shop since the statute "merely prohibits agreements and conduct which conditions employment on membership in a labor organization."³⁰ Membership, however, under the NLRB's rationale is the payment of fees and dues. Thus, one should question the rationale employed by the court in *Hagberg*.

Various decisions have been rendered in the public sector concerning the legality of agency shop clauses. In *New Jersey Turnpike Employees, Local 194 v. New Jersey Turnpike Authority*, a New Jersey court was faced with the task of determining whether such a clause was permissible in light of the following statutory provision: "Public employees shall have, and shall be protected in the exercise of, the right to freely and without fear of penalty or reprisal, to form, join and assist any employee organization or to refrain from such activity."³¹

In interpreting the above language, the court held that the execution of an agency shop agreement violated an employee's right to refrain from assisting an employee organization. Relying on the right of employees to refrain from "assisting" an employee organization, the court concluded that the enforcement of an agency shop clause would have the effect of "inducing,

if not compelling, union membership, participation, and assistance on the part of non-member employees."³²

Similarly, in *Monroe-Woodbury Teachers Assn.* the New York Public Employment Relations Board (PERB) held that an agency shop clause was illegal. In reaching its decision the New York board relied on several factors. First, it found that an "agency shop . . . is inconsistent with the statutory grant of right that employees may refrain from 'participating in' an employee organization."³³ In addition, the Public Employment Relations Board found that the negotiation of an agency shop clause was in conflict with the New York Teachers Tenure Act and the New York dues deduction law.

On appeal the PERB's holding was affirmed. The Appellate Division of the New York Supreme Court found that to require the payment of dues "would be in violation of the law as constituting, at the very least, participation in an employee organization."³⁴ The court also held that the negotiation of an agency shop was inconsistent with the provisions of the New York Public Employee Relations Act, which makes it unlawful to "discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of any employee organization."³⁵

In Illinois, the Attorney General has issued a recent opinion which has held that employees of a county highway department cannot be required to join a union should the county board recognize and bargain with the union as the exclusive representative of the highway department employees. In addition, the Attorney General held that union dues can be deducted only if the employee requests to have this done. In light of these opinions and the current state law, the union security issue in Illinois can only be resolved through legislative action.

Some of the issues present in both the public and private sector with respect to the unionization of librarians concern the status of librarians as professional employees and their role as supervisors. The National Labor Relations Board has considered librarians to be professionals and have therefore included them in units with other faculty members. The board has also rejected the argument that the supervision of nonprofessional personnel by librarians automatically makes them supervisors so as to deny them bargaining rights. The board considers the amount of time that librarians spend supervising and the group which is supervised.

In discussing the legal environment, it is important to point out that various changes are currently being proposed which would affect library personnel. Several bills are now pending in Congress to either extend NLRA coverage to public employees or to create a national public employee relations act. The wisdom of having federal legislation cover public employees is in doubt since there are great differences among states which must be considered

in drafting and enacting any public employee relations bill. It seems better to deal with this issue on a state rather than a federal level, even though it might be necessary to set some minimum federal standards which states are required to meet.

Until there is legislation in states like Illinois, the great majority of library personnel have to depend on judge-made law which is an inadequate means to solve the major problems posed in this area. In the absence of a statutory framework, courts are ill equipped to deal with the myriad of issues raised in this area.

The current labor relations scene in Illinois represents a patchwork of thoughts and ideas, most of which are confusing and not very meaningful. Other than Executive Order 6, which Illinois Governor Daniel Walker issued in September 1973, there is no framework to guide labor relations for public employees in that state.

The legal environment surrounding the unionization of library personnel illustrates the difference between the public and private sectors. While librarians in the private sector can negotiate virtually all matters, their public sector counterparts are generally not given such a generous menu to negotiate. While librarians in the private sector can strike, their public sector counterparts are generally denied recourse to this tool of economic warfare. But while librarians in the private sector must rely on the economic force they can generate to bring about a settlement, their public sector counterparts can often rely on impasse resolution devices to solve differences.

To this already confusing environment we add the fact that the rights of librarians in the public sector may often vary from employer to employer. The situation will not become any clearer until legislation is passed which establishes a basic framework to protect employers, employees and the public.

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